



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. E005 OF 2021

AS CONSOLIDATED WITH PETITION NO. E433 OF 2020, E007 OF 2021, E009 OF 2021, E011 OF 2021, E012 OF 2021, E013 OF 2021, E015 OF 2021, 019 OF 2021 AND E021 OF 2021

IN THE MATTER CONCERNING ALLEGED VIOLATIONS OF ARTICLES 1(1), 1(3), 2(1), 2(3), 2(4), 3(1), 3(2), 6(2), 10, 38(2), 38(3)(B), 73, 74,81,94,165, 174,175, 179, 181, 182(4), 182(5), 182(6), 183, 185(1), 196, 258, 259(1), 259(3), AND 259(11) OF THE CONSTITUTION OF KENYA 2010: AND IN THE MATTER OF COUNTY GOVERNMENTS(AMENDMENT) ACT, 2020 AND IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012 AND IN THE MATTER OF PUBLIC APPOINTMENNTS(COUNTY ASSEMBLIES APPROVAL)ACT, 2017 AND IN THE MATTER OF THE ASSUMPTION OF THE OFFICE OF GOVERNOR ACT, 2019

BETWEEN

- OKIYA OMTATAH OKOITI..... 1ST PETITIONER**
- HABIB OMAR KONGO.....2ND PETITIONER**
- PATRICK MWANGI KIIRU.....3RD PETITIONER**
- JOSPHAT KARIUKI.....4TH PETITIONER**
- ANGELA MWIKALI..... 5TH PETITIONER**
- MUIRURU WAWERU..... 6TH PETITIONER**
- THIRDWAY ALLIANCE KENYA.....7TH PETITIONER**
- LAW SOCIETY OF KENYA.....8TH PETITIONER**
- KENYA HUMAN RIGHTS COMMISSION.....9TH PETITIONER**
- GEOFFREY MAKWORO.....10TH PETITIONER**

AND

- ANNE KANANU MWENDA.....1ST RESPONDENT/CROSS-PETITIONER**
- NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT**
- THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY.....3RD RESPONDENT**
- THE CLERK, NAIROBI CITY COUNTY ASSEMBLY.....4TH RESPONDENT**
- THE ATTORNEY GENERAL.....5TH RESPONDENT**

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....6TH RESPONDENT

THE GOVERNMENT PRINTER.....7TH RESPONDENT

AND

HON. MIKE MBUVI SONKO KIOKO GIDION.....1ST INTERESTED PARTY

THE SENATE.....2ND INTERESTED PARTY

KATIBA INSTITUTE.....3RD INTERESTED PARTY

POLYCARP IGATHE.....4TH INTERESTED PARTY

JUBILEE PARTY.....5TH INTERESTED PARTY

NAIROBI CITY COUNTY EXECUTIVE.....6TH INTERESTED PARTY

KRISTINA PRATT KENYATTA.....7TH INTERESTED PARTY

JANE WERU.....8TH INTERESTED PARTY

UNITED DEMOCRATIC MOVEMENT PARTY.....9TH INTERESTED PARTY

ISAAC CHEGE NJUGUNA.....10TH INTERESTED PARTY

BENCH RULING NO. 3

1. Through the notice of motion application dated 24th February, 2021, the 3rd Respondent, the Speaker of the Nairobi City County Assembly seeks orders as follows:

a. That this application be certified urgent, service thereof be dispensed with and the application be heard *ex parte* in the first instance.

b. That this application be heard and determined on priority basis.

c. That pending the hearing and determination of this application *inter partes* this Honourable Court be pleased to stay any other proceedings in this matter.

d. That in the alternative to prayer (c) above, the Honourable Court be pleased to stay the proceedings in this petition pending the determination of the issue of the powers of the Chief Justice to empanel a bench under Article 165(4) without first taking an oath of office to act as a Chief Justice.

e. That this Honourable Court be pleased to suspend and/or set aside the decision, order and/or directions of the Honourable Deputy Chief Justice contained in the Notice issued by the Honourable Deputy Registrar on 18th February, 2021, constituting a 3-Judge bench to hear and determine this matter comprising-

1. Hon. Mr. Justice Said Chitembwe – Presiding Judge

2. Hon. Mr. Justice Weldon Korir, and

3. Hon. Lady Justice Wilfrida Okwany.

f. That the Court be pleased to grant such other relief as it may deem fit and just to grant.

g. That the costs of this application be provided for.

2. The application is supported by the grounds on its face and an affidavit sworn by Hon. Benson Mutura, the Speaker of the Nairobi City County Assembly on the date of the application.

3. In brief, the Applicant asserts that although it was determined in *Leina Konchellah & others v Chief Justice and President of Supreme Court of Kenya & others; Speaker of National Assembly & others (Interested Parties) [2021] eKLR* that the Deputy Chief Justice can appoint a bench of judges under Article 165(4) of the Constitution, that mandate is only restricted to circumstances where the Chief Justice has delegated that specific administrative power to the Office of the Deputy Chief Justice.

4. The Applicant agrees that on 10th February, 2021, when the consolidated petitions were referred to the Chief Justice for empanelment of a bench under Article 165(4) of the Constitution, the substantive Chief Justice had long retired and thus incapable of delegating that administrative power to the Office of the Deputy Chief Justice. It is nevertheless, the Applicant's contention that the empanelment by the Deputy Chief Justice raises a fundamental constitutional question as to whether an oath of office needed to have first been administered upon the Deputy Chief Justice before assuming and executing functions as an Acting Chief Justice.

5. The Applicant avers that the ability of the Deputy Chief Justice to act as Chief Justice and exercise the authority and power of the Chief Justice in an acting capacity, including the powers under Article 165(4) of the Constitution, without taking an oath to act as Chief Justice is the subject of an active challenge in **High Court Constitutional Petition No. E506 of 2021 – Okiya Omtatah Okoiti v Chief Registrar of the Judiciary & 3 others**. [The petition is actually No. E.056 of 2021 and not E.506 of 2021 as stated by the Applicant].

6. The Applicant asserts that the empanelment creation of this bench to hear this petition is part of the acts being challenged in the stated petition and if the petition succeeds then the entire proceedings in this matter from the point of empanelment will be rendered a nullity. This court is therefore urged to suspend or set aside the decision of the Deputy Chief Justice to appoint this bench as no prejudice will be occasioned to any party.

7. The 8th and 9th petitioners (Law Society of Kenya and Kenya Human Rights Commission) opposed the application through grounds of opposition dated 4th March, 2021.

8. The 8th and 9th petitioners' case is that Article 165(2)(b) of the Constitution establishes the Office of the Deputy Chief Justice who shall be the deputy head of the Judiciary. Further, that Article 163(1)(b) designates the Deputy Chief Justice to deputize for the Chief Justice and be the Vice President of the Supreme Court.

9. The 8th and 9th petitioners contend that it is a fallacy that the Deputy Chief Justice cannot perform administrative powers of the Chief Justice such as empanelment of a bench yet Section 5(4) of the Judicial Service Act, 2011 contemplates a situation where the Deputy Chief Justice discharges the duties of the Office of the Chief Justice for six months pending the appointment of a new Chief Justice. They also highlight Article 259(3)(a) & (b) of the Constitution as providing that a person holding an office may perform or exercise a function or power of that office as occasion requires, and that reference to a state or other public officer or office includes a reference to the person acting in or otherwise performing the functions of the office at any particular time.

10. The question raised by the Applicant is whether the Deputy Chief Justice can exercise the powers or functions of the Chief Justice without taking an oath of office. The Applicant does not invite us to determine that question but prays that we suspend or set aside the decision of the Deputy Chief Justice to empanel this bench as we await decision of that issue in **Nairobi High Court Constitutional Petition No. E056 – Okiya Omtatah Okoiti v Chief Registrar of Judiciary & 3 others**.

11. The question whether the Deputy Chief Justice can exercise the powers donated to the Chief Justice under Article 165(4) was emphatically answered in the ruling delivered on 18th February, 2021 by five judge bench in **Leina Konchellah & others v Chief Justice and President of Supreme Court of Kenya & others; Speaker of National Assembly and others (Interested Parties) [2021] eKLR** as follows:

“It is therefore our finding that the constitutional function of the Chief Justice to assign benches under Article 165(4) being an administrative function, can be performed by the Deputy Chief Justice when the Chief Justice is for good reason, unable to perform”.

12. Fortunately, the Applicant agrees with this statement of the law. The Applicant, however, urges us to await the outcome of the determination of the issue in Petition E056 of 2021 as to whether in the absence of the Chief Justice the Deputy Chief Justice must first take an oath before performing the administrative functions of the Chief Justice. He has not asked us to determine the issue and we make no comment lest we prejudice the positions of the parties in that matter.

13. The question that begs an answer is whether the Applicant has persuaded us that it is in the interests of justice that we stay this pending the outcome of another matter whose issues and parties are entirely different from those in these consolidated petitions. We think not. All the parties herein are agreed that the consolidated petitions are extremely urgent as they will determine whether the appointment of the 1st Respondent/Cross-Petitioner, Anne Kananu Mwenda, as the Deputy Governor of Nairobi City County is legitimate. That is not an issue that should await the determination of another petition. The legitimacy of this bench cannot be hinged on another matter considering that all the parties agree that the Deputy Chief Justice can exercise the powers granted to the Chief Justice to empanel a bench under Article 165 (4).

14. The upshot is that we find the instant application without merit and we dismiss it. The issue of costs shall abide the outcome of the consolidated petitions.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF MARCH 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON 17TH APRIL 2020.

S. CHITEMBWE

JUDGE

W. KORIR

JUDGE

W.A. OKWANY

JUDGE